

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA TYLER

CIVIL ACTION

v.

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NO. 99-4458

PHILADELPHIA HOUSING  
AUTHORITY, et al.

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**ORDER**

AND NOW, this *4th* day of January, 2001, upon consideration of Defendants' Motion for Summary Judgment (Docket # 29) and all Responses thereto, and after Oral Argument, IT IS HEREBY ORDERED that the Motion is GRANTED.

The reasons for this decision are as follows.

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this burden, the non-moving party must present evidence that there is a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,323-25 (1986). In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. See Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993).

As an initial matter, the defendants' motion for summary judgment with respect to the four individual defendants (i.e., Chico Cannon, Richard A. Zappile, M. Carolyn Sistrunk,

and Joann Fencl) is conceded by the plaintiff. See Pl. Resp. at 2-3. Thus, the only claim that remains is an action under 42 U.S.C. § 1983 against the Philadelphia Housing Authority (“PHA” or “the defendant”) for violating the plaintiffs Fourteenth Amendment equal protection rights. The Amended Complaint alleges that the plaintiff was discriminated against when she was denied a promotion to the rank of Sergeant in March of 1991. The plaintiff names in the Amended Complaint the **PHA** and the individual defendants allegedly associated with that incident. The plaintiff’s subsequent briefs allege discrimination with respect to a failure to promote in 1995. At oral argument, the plaintiff confirmed that the incident at issue is the 1995 failure to promote and conceded that the 1991 failure to promote was non-discriminatory. Regardless of which incident is complained of, summary judgment should be granted to the defendant.

The plaintiff applied for a promotion to the rank of Sergeant in 1991 even though she did not have the educational requirement for that position (i.e., a high school or equivalency diploma). See Tyler Dep., D. Mot., **Ex. A**, at 64. The plaintiff placed first on a written examination, see Memorandum of Mar. 21, 1991, Pl. Resp., **Ex. N**, at 1; but she was not given the promotion when it was discovered that she did not meet the educational requirement- The plaintiff now concedes that PHA's decision in 1991 was not discriminatory.

Shortly after the 1991 decision, the **PHA** eliminated the educational requirement for Sergeants. In 1995, a male officer, Edward Williams, was promoted to the rank of Sergeant. Sgt. Williams did not have a high school or equivalency degree. The plaintiffs current contention is that PHA discriminated against her in 1995 when it promoted Sgt. Williams, but **did** not promote the plaintiff.

The defendant argues that the plaintiff has failed to bring the suit within the applicable statute of limitations period.’ Typically, a § 1983 claim must be brought within two years of the date when the plaintiff learned of the cause of the alleged injury. See Smith v. City of Pittsburgh, 764 F.2d 188, 194 (3d Cir. 1985); **42 Pa. C.S. § 5524**. Assuming that the statutory clock started ticking when the plaintiff learned of Sgt. Williams’s promotion in 1995, the Complaint would have had to have been filed by 1997. Instead, it was filed in September of 1999. (The Amended Complaint was filed in February of 2000.) Thus, it would appear that the plaintiff has failed to bring her suit within the requisite time period.

The plaintiff requests the Court to apply equitable tolling, a form of equitable estoppel: because she did not learn that Sgt. Williams did not have a high school or equivalency

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<sup>1</sup> The plaintiff points out in her brief that this is the third time the defendants have raised the statute of limitations argument in this case, See Pl. Resp. at 10 n. 3. Indeed, both of the defendants’ previous motions to dismiss were denied by the Honorable Edward C. Robreno. However, Judge Robreno’s decision to deny the statute of limitations argument was based on the Third Circuit’s holding in Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994) that a plaintiff need merely to “plead the applicability of the doctrine” of equitable tolling in order to survive a motion to dismiss. Because the plaintiff had pleaded the applicability of the doctrine, Judge Robreno denied the defendants’ motion but stated that “this court offers no view as to the ultimate benefit the doctrine of equitable tolling will have with respect to plaintiffs claim.” See Order of January 24, 2000, at 2 n.4. Thus, Judge Robreno’s earlier denials are not relevant to the instant motion for summary judgment.

<sup>2</sup> The plaintiff actually argues for the application of equitable tolling and, in the alternative, equitable estoppel. See Pl. Resp. at 1. However, equitable tolling is a form of equitable estoppel and thus cannot be an alternative thereto. See Richteritsch v. Unisys Corp., No. Civ. A, 95-1274, 1995 WL 696679, at \*2 (E.D. Pa. Nov. 22, 1995).

Indeed, the plaintiff later specifies that by “equitable estoppel” what she really means is “fraudulent concealment,” as that concept is discussed in Sheet Metal Workers Local 19 v. 2300 Group, Inc., 949 F.2d 1274, 1280 (3d Cir. 1991). See Pl. Resp. at 13. However, even Sheet Metal categorizes the fraudulent concealment doctrine as one of the “tolling principles” developed by the Pennsylvania state courts. According to the Third Circuit, **the state courts’** doctrine of fraudulent concealment inquires into “whether there was an affirmative and independent act of concealment that would divert or mislead a plaintiff about the underlying cause of action.” See Sheet Metal, 949 F.2d at 1280 (citing Gee v. CBS, Inc., 471 F. Supp. 500, (continued...))

degree until 1998. The plaintiff claims that in 1995, she was told by PHA administrative staff that Sgt. Williams **did** not have a high school diploma. She then asked two PHA officials who told her that he did have one. See Tyler Dep., Pl. Resp., **Ex. A**, at 100-02, 119, 86-87.<sup>3</sup> She claims, therefore, that she was actively misled by the PHA and that equitable tolling is appropriate.

The doctrine of equitable tolling stops the statute of limitations ~~from~~ running where certain equitable factors **are** present. See *Lake v. Arnold*, 2000 WL 1677203 (3d Cir. Nov. 7, 2000) (citing *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387-88 (3d Cir. 1994)). The burden is on the plaintiff to demonstrate facts that support equitable tolling. See *Byers v. Follmer Trucking Co.*, 763 F.2d 599, 600-01 (3d Cir. 1985).

The Supreme Court has held that equitable tolling does not extend to “what is at best a garden variety claim of excusable neglect.” *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990). Equitable tolling is to be used “sparingly,” *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 237 (3d Cir. 1999), and “restrictions on equitable tolling . . . must be scrupulously observed.” *School District of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981). Equitable tolling may be appropriate “where the defendant has actively misled the plaintiff.” See *Seitzinger*, 165 F.3d at 240.

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( . . . continued )

624 (E.D. Pa. 1979)). Thus, despite the confusing terminology, the doctrine of fraudulent concealment is actually a variant of the circumstances already identified by the Third Circuit as suitable for equitable tolling (i.e., “**where** the defendant has actively misled the plaintiff”). See *Forbes v. Eaeleson*, 228 F.3d 471, 486 (3d Cir. 2000). Consequently, this discussion focuses on “equitable tolling” in general, but encompasses the doctrine of fraudulent **concealment as well**.

<sup>3</sup> The defendants’ Motion for Summary Judgment hereinafter shall be referred to as “D. Mot.,” and the plaintiffs Response as “Pl. Resp.” The defendants’ Reply, which the defendants have designated **as** a “Response,” shall be referred to as “D. Resp.”

In deciding the defendant's motion for summary judgment, the Court must determine whether there is sufficient evidence of each of the following: (1) that the defendant engaged in affirmative acts of concealment designed to mislead the plaintiff regarding facts supporting her claim; (2) that the plaintiff exercised reasonable diligence; and (3) that the plaintiff was not aware, nor should have been aware, of the facts supporting her claim until a time within the limitations period measured backwards from when the plaintiffs filed her complaint. See Forbes v. Ealeson, 228 F.3d 471, 487 (3d Cir. 2000).

The plaintiff claims that the two highest officials in the PHA Police Department told her that *Sgt. Williams* possessed a high school diploma, when in fact he did not. Once she learned in 1998 that he did not, the plaintiff promptly filed her EEO complaint. See Pl. Resp. at 12. Although the plaintiff's only evidence of the defendant's actions is her own deposition testimony, the Third Circuit has held that "self-serving testimony may be utilized by a party at summary judgment." See Waldron v. SL Industries, Inc., 56 F.3d 491, 501 (3d Cir. 1995). Thus, for purposes of summary judgment, the plaintiff has adequately alleged that the defendant misled her, and that she did not learn the facts supporting her claim until 1998.

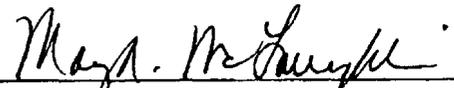
The plaintiff, however, **cannot** show that she exercised "reasonable diligence" in pursuing her claim. She easily could have asked *Sgt. Williams* if he had a high school diploma. **A** reasonably diligent **plaintiff** would have done so, given the conflicting information that **had** been presented to her by that point in time. See, e.g., Tyler Dep., D. Resp., Ex. Q, at 86, 101; Notes of **Apr. 10, 1995, D. Resp., Ex. R**. As the Supreme Court has stated, "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984). Accordingly, I find that equitable tolling does not apply in this situation, and that the statute of limitations has expired.

Even if the plaintiffs claim were not time-barred, it would still fail as a matter of law. To establish a prima facie case under 42 **U.S.C**§ 1983, the plaintiff must allege two elements: (1) the action occurred “under color of law,” and (2) the action is a deprivation of a constitutional right or a federal statutory right. See Parratt v. Taylor, 451 U.S. 527, 535 (1981). Even if the 1995 failure to promote occurred “under color of law,” the plaintiff has failed to show a deprivation or injury of any sort. The plaintiff has not shown that she applied for the promotion in 1995. The plaintiff claims that her 1991 application for promotion was still pending in 1995, but the only evidence she has presented in support of this claim is an unsigned affidavit from Sgt. Williams stating that he did not make a separate application in 1995. **At** oral argument, the plaintiffs counsel admitted that he had been unable to get the affidavit signed by *Sgt. Williams*, and he conceded that the affidavit should be disregarded.

On the other hand, the defendant has presented an array of testimonial and documentary evidence showing that the plaintiffs 1991 application did not “carry over” to 1995. See D. Resp., at 10; Cannon Dep., D. Mot., **Ex. B**, at 8, 19, 43; Memo of June 13, 1991, D. Resp., **Ex. S**; Glover Dep., D. Resp., Ex. T, at 17; Memo of Oct. 10, 1991, D. Resp., **Ex. U**. The plaintiff has attacked the credibility of **the** defendant’s evidence, but even if all of the defendant’s evidence is disregarded, the plaintiff has still failed to produce any evidence

showing that she was a contender for the promotion in 1995. Without an application, there can be no denial, and without a denial, there can be no illegal denial.<sup>4</sup>

BY THE COURT:

  
MARY A. McLAUGHLIN, J.

14/01 to:  
Guinn, log.  
Turner, log.

14/01 to:  
Wigman, log.  
Omni, log.  
Cory, log.

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<sup>4</sup> Even if the plaintiff had demonstrated diligence in preserving her claim and a cognizable injury under § 1983, she would still have to show that the PHA is subject to liability under Monell v. Department of Social Services, 436 U.S. 658 (1978). Under Monell, a local governing body may be sued for an action that “implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” ~~See id.~~ at 690. Liability also attaches where a constitutional deprivation is “visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.” See id. at 690-91.

The plaintiff claims that the first category of local government liability applies; i.e., that the decision to promote Sgt. Williams was an official “proclamation, policy, or edict.” See Pl. Resp. at 17. The basis for this argument is that a high-ranking PHA official signed the form promoting Officer Williams to the rank of Sergeant in 1995.

Although a single decision by an official with policy-making authority can constitute official policy and be attributed to the government itself, see Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), it seems unlikely that a discretionary employment decision falls within Pembaur. The Court need not decide this issue, however, because it grants summary judgment on the two issues discussed above.

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:

NO. **99-4458**

**CIVIL JUDGMENT**

Before the Honorable Mary **A.** McLaughlin

**AND NOW**, this *4<sup>th</sup>* day of January, 2001, in accordance with Rule **58** of  
the Federal Rules of Civil Procedure,

IT IS ORDERED that Judgment be and the same is hereby entered IN FAVOR  
OF defendants Philadelphia **Housing** Authority, Chico **Cannon**, Richard **A.** Zappile, **M.** Carolyn  
Sistrunk, and Joann Fencl, and **AGAINST** Patricia Tyler.

ATTEST:

BY THE COURT:

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Carol D. James, Deputy Clerk

*Mary A. McLaughlin*  
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Mary A. McLaughlin, J.